Litigation Section of The State Bar of California

Litigation Update

Litigation Section News

February 2006

Litigation Section Events

2006 Annual Trial Symposium & Litigation Section Retreat

April 21–23, 2006
Silverado Country Club and Resort
Napa Valley, CA

A Week in Legal London

July 9-14, 2006

A Week in Legal London is an extraordinary opportunity to experience the inner workings of the English legal system, expand litigation skills and engage in thought provoking discussions with leading distinguished members of the London legal community. Attend sessions at the Royal Courts of Justice, the Old Bailey, Magistrates and Crown Courts. Meet and dine with leading judges, barristers and solicitors. Visit the four Inns of Court and historic sites in London.

Oxford University Summer Program

Magdalen College, Oxford University

July 16-20, 2006

In conjunction with A Week in Legal London, the Litigation Section's Oxford University Summer Program is an "inside the walls" experience at Magdalen College, Oxford University. This program is a combination of both law and history, fascinating to all participants, attorneys and non-attorneys alike. You can choose to attend either the London or Oxford program or both.

By attending both programs you will satisfy all you MCLE requirements including the mandatory subjects. For a more complete description of each program see our web site, or call the Litigation Section at (415) 538-2546.
Click here: State Bar of California Week in the UK

Time for filing motion for attorney fees runs from entry of judgment. *Cal. Rules of Court*, rule 870.2(b)(1) requires that a motion for attorney fees be filed within the time for filing a notice of appeal. Rule 2(a) requires that a notice of appeal be filed within 60 days after service of a notice of entry of judgment.

In *Saben, Earlix & Associates v. Fillet* (Cal. App. Fourth Dist., Div. 3; December 9, 2005) 134 Cal.App.4th 1024, [2005 DJDAR 14214], the parties in whose favor summary judgment was granted, filed a motion for fees more than 60 days after the court entered the order granting summary judgment. The trial court denied the motion as having been filed too late. But an order granting summary judgment is not appealable. The appeal lies from the judgment which should follow the order granting summary judgment. Since no judgment had been entered when the motion was filed, it was premature rather than too late and the order denying attorney fees was reversed.

An action under the Unfair Competition Law cannot support a claim for non-restitutionary disgorgement. The Unfair Competition Law (*Bus. & Prof. Code* §17200 ff.) provides remedies in the form of injunctions and restitution. But plaintiff is not entitled to have the defendant disgorge illegally obtained moneys (i.e. damages). *Feitelberg v. Credit Suisse First Boston* (Cal. App. Sixth Dist.; December 9, 2005) 134 Cal.App.4th 997, [2005 DJDAR 14229].

An amended pleading may not directly contradict allegations in the earlier pleading. Where an unlicensed contractor sued for breach of contract and foreclosure of a mechanics lien, the court sustained defendant's demurrer on the basis of *Bus. & Prof. Code* §7031(a) which precludes an unlicensed contractor from collecting compensation. (*See also*, *MW Erectors, Inc. v. Niederhauser Ornamental etc., Inc.* (2005) 36 Cal.4th 412, [30 Cal.Rptr.3d 755].) After the court sustained defendant's demurrer to a suit for breach of contract by an unlicensed contractor, the latter sought to amend the complaint by alleging that he merely supplied fixtures. The trial court dismissed the amended complaint on the basis that it contradicted material allegations of the original complaint and the Court of Appeal affirmed. *Banis Restaurant Design, Inc. v. Borgata Serrano* (Cal. App. Third Dist.; November 18, 2005) (ord. pub. December 12, 2005) 134 Cal.App.4th 1035, [2005 DJDAR 14238].

No right to recover for negligent infliction of emotional distress because of economic damages. *Butler-Rupp v. Lourdeaux* (Cal. App. First Dist., Div. 1; December 14, 2005) 134 Cal.App.4th 1220, [2005 DJDAR 14415] reiterated the well established rule that a party cannot recover damages for negligent infliction of emotional distress based on property damage, breach of contract, or other economic losses. The Court of Appeal reversed the judgment to the extent such damages were awarded based on defendant-lessor's failure to provide adequate heating for the tenant.

Law Suits Fifth Annual Statewide Clothing Drive

During the month of March drop off your gently used suits at any Men's Wearhouse in California. You will receive a receipt for your donation and a 10% discount from Men's Wearhouse on your next purchase.
Click here for more information.

Where landowners delegate responsibility of contractor's employees safety, they are not liable to employees. Hirers of independent contractors may delegate the responsibility for the safety of the contractor's employees to the contractor. And the owner is not liable to the contractor's employees for injury resulting from a dangerous condition. But, if the landowner fails to tell the contractor of the existence of a latent hazard, the owner may be liable. *Kinsman v. Unocal Corp.* (Cal.Supr.Ct.; December 19, 2005) (Case No. S118561) 37 Cal.4th 659, [2005 DJDAR 14539].

A motion for reconsideration after judgment does not extend the time for appeal. Parties have 60 days from the date the notice of entry of judgment is served to file an appeal. *Cal. Rules of Court*, rule 2. *Cal. Rules of Court*, rule 3, subdivision (d), extends the time to appeal where the appellant has filed a valid motion to reconsider. But where the court entered judgment before ruling on the motion to reconsider, it lost the power to rule on the motion and hence the time for appeal was not extended. *Safeco Ins. Co. of Illinois v. Architectural Facades Unlimited, Inc.* (Cal. App. Sixth Dist.; December 19, 2005) 134 Cal.App.4th 1477, [36 CalRptr.3d 754, 2005 DJDAR 14616].

Obtain a confidentiality waiver for settlement reached in mediation. As a general proposition nothing said or done in the course of a mediation is admissible. *Evid. Code* §1119. So how do you enforce a settlement agreement reached during the course of a mediation? Consult *Evid. Code* §§ 1118, 1123, and 1124, regarding the procedures to be followed to avoid being unable to present evidence of a settlement. An oral settlement agreement may be enforced if (1) it is recorded by a court reporter or other reliable sound recorder, (2) the terms are recited on the record in the presence of the parties and the mediator and the parties acknowledge agreement, (3) the parties express the intent that the agreement is enforceable or binding, (4) the recording is reduced to writing and the writing is signed by the parties within 72 hours. A written settlement agreement prepared during a mediation is admissible if (1) signed by the parties, (2) the agreement specifies that it is admissible or subject to disclosure, (3) the agreement specifies that it is enforceable or binding, and (4) the agreement is used to show fraud, duress, or illegality relevant to an issue in dispute. *Stewart v. Preston Pipeline, Inc.* (Cal. App. Sixth Dist.; December 20, 2005) 134 Cal.App.4th 1565, [2005 DJDAR 14681].

No CEQA review required for interior modifications. Some of you may be relieved to learn that the Environmental Quality Act (*Pub. Resources Code* §§ 21000 ff.) does not apply to interior modifications in your homes. At least that is what the First District Court of Appeal held in *Martin v. City and County of San Francisco* (Cal. App. First Dist., Div. 4; December 29, 2005) 135 Cal.App.4th 392,[2006 DJDAR 120]. The modifications in question were not visible to the general public and the court rejected a demand by the city planning department that the owner should first obtain review under CEQA before a permit for interior remodeling could be considered.

Attorney disqualified in successive representation case even in absence of information sharing. Where a firm represented a party and then associated as counsel an attorney who previously obtained confidential information from the opposing party, it must be disqualified even in the absence of any evidence that confidential information was shared between the firm and the associated lawyer. *Pound v. Cameron* (Cal. App. Fifth Dist.; December 21, 2005) 135 Cal.App.4th 70, [2005 DJDAR 14734] reversed the trial court's denial of the disqualification motion. An earlier case held, under somewhat analogous facts, that disqualification under these circumstances was not automatic but depended on evidence that information had been shared. *Frazier v. Superior Court*, (2002) 97 Cal.App.4th 23, [118 Cal.Rptr.2d 129]. Federal cases are apparently to the same effect. *See, Smith v. Whatcott* (10th Cir., 1985) 774 F.2d 1032.

Evaluation of New Civil Jury Instructions:

The Jury Instruction Committee is actively involved in reviewing, and recommending changes to, the new California Civil Jury Instructions. VerdictSearch, a division of American Lawyers Media, is assisting in the solicitation of input and feedback from practicing attorneys who have recently tried cases in California.

If you are interested in reporting on a recent trial in California and providing your feedback on the new CACI jury instructions, click here.

Note: There are two lessons from *Pound*. For the second co-counsel: keep track of your potential clients, not just those who retain you. For the co-counsel who is recused because of imputed disqualification, no amount of inquiry of the lawyer whose disqualification causes your recusal will protect you. If the other lawyer is recused, even if he or she didn't tell you anything about the case, you are disqualified.

State court judgment entitled to full faith and credit in bankruptcy proceedings. Where judgments of state courts were final they were binding on the bankruptcy court under the RookerFeldman doctrine and the doctrine of claim preclusion. *Lee v. TCAST Communications, Inc.* (BAP, November 9, 2005) (ord. pub. December 14, 2005) [2005 DJDAR 14794].

Partnership agreement providing for share of departing partner's fee is not illegal fee splitting. An attorney signed a partnership agreement wherein he agreed, that if he left and took cases with him, he would pay the firm a percentage of fees derived from such cases. He left the firm and refused to pay. The Court of Appeal affirmed a judgment in favor of the firm, ruling that such an agreement did not constitute an illegal fee-splitting agreement. *Anderson, McPharlin & Connors v. Yee* (Cal. App. Second Dist., Div. 1; December 23, 2005) 135 Cal.App.4th 129, [2005 DJDAR 14833].

Amended complaint does not relate back to factually devoid original complaint. Where the original complaint was filed within the statute of limitations but was devoid of factual allegations, the amended complaint filed after the statute had run did not relate back. "An amended complaint relates back to a timely filed original complaint, and thus avoids the bar of the statute of limitations, only if it rests on the same general set of facts and refers to the same 'offending instrumentalities,' accident and injuries as the original complaint." Therefore, where the original complaint failed to allege facts, the relation back doctrine does not apply. *Davaloo v. State Farm Insurance Co.* (Cal. App. Second Dist., Div. 7; December 30, 2005) 135 Cal.App.4th 409, [2006 DJDAR 53].

Sophisticated user doctrine under review by Supreme Court. In our December newsletter we reported that in *Johnson v. American Standard, Inc.*, (Cal. App. Second Dist., Div. 5; October 17, 2005) 133 Cal.App.4th 496, [34 Cal.Rptr.3d 863, 2005 DJDAR 12366], the Court of Appeal adopted the "sophisticate user" doctrine limiting liability for failure to warn of a dangerous condition. The California Supreme Court has granted hearing in the case. (Case No. S139184.)

No abuse of process in filing a motion. In affirming dismissal of a complaint under the anti-SLAPP statute (*Code Civ. Proc.* §425.16), the Court of Appeal held that, whether meritorious or not, the filing of a motion cannot be the basis for a cause of action for abuse of process. *Ramona Unified School District v. Tsiknas* (Cal. App. Fourth Dist., Div. 1; December 9, 2005) (ord. pub. January 6, 2006) [2006 DJDAR 199].

Court lacks power to remove arbitrator. A judgment on an arbitration award was reversed where the trial court had removed an arbitrator and appointed another in his place. *Bosworth v Whitmore* (Cal. App. Second Dist., Div. 4; January 6, 2006) [2006 DJDAR 235].

Participate In The Discussion Board Excitement

See what all the excitement is about! We are having great participation on our State Bar Litigation Section Bulletin Board. Join in on the exciting discussions and post your own issues for discussion.

If you have any comments, ideas, or criticisms about any of the new cases in this month's issue of Litigation Update, please share them with other members on our website's discussion board.

Our Board is quickly becoming "The Place" for litigators to air issues all of us are dealing with. Go to: http://members.calbar.ca.gov/mb/ShowForum.aspx?ForumID=13 to explore the new bulletin board feature—just another benefit of Litigation Section membership.

Remember to first fill out the Member Profile to get to the Discussion Board!

Rules & Legislation—Proposed Changes

The California Legislature is currently proposing changes in the following areas:

1. Publication of Court of Appeal Opinions
2. Electronic Discovery
3. Trade Secrets Proposal

If you care to weigh in on any of these, or other proposed changes by the legislature, please send your comments to: Ejolsen@mofo.com